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Supreme Court, U.S.
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No. 93-1963

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JEROME KAHN HOROWITZ
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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MISCELLANEOUS

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STATEMENT OF THE CASE

On or about May 19, 1993, Petitioner, Jerome Kahn Horowitz, an attorney licensed to practice law in the State of Texas, ("Horowitz"), was convicted by a jury of the felony offense of sexual assault in Cause No. 92CR0767, styled *The State of Texas v. Jerry Horowitz*, In the District Court of Galveston County, Texas, 212th Judicial District. On or about August 5, 1993, Horowitz's sentence to confinement for a period of ten (10) years was fully probated and he was ordered to pay a fine in the amount of $6,800.

The Chief Disciplinary Counsel for the State Bar of Texas commenced compulsory discipline proceedings against Horowitz with the Board of

Disciplinary Appeals ("Board") pursuant to Part VIII of the Texas Rules of Disciplinary Procedure. (See Appendix to Horowitz Petition Pp. 9a-13a [Part VIII of the Texas Rules of Disciplinary Procedure reprinted]). A hearing was held before the Board on November 5, 1993. The Board found that Horowitz was convicted of an Intentional Crime as defined by Tex.R.Disc.P. 1.06(O), and suspended Horowitz from the practice of law during the term of his criminal probation. (See Appendix to Horowitz Petition Pp. 13a [Tex.R.Disciplinary P. 1.06(O) reprinted] and 2a [Judgment of the Board of Disciplinary Appeals reprinted])

Horowitz appealed the judgment of the Board to the Texas Supreme Court. The Texas Supreme Court affirmed the judgment of the Board without opinion (See Appendix to Horowitz Petition P. 1a [Letter Ruling of Texas Supreme Court reprinted]).

OBJECTION TO JURISDICTION

The Petition for Writ of Certiorari should be denied as Petitioner, Jerome Kahn Horowitz ("Horowitz", has failed to establish jurisdiction in accordance with either 28 U.S.C. §1257, Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States. No federal question was decided by the state court of last resort. Nor does the case involve the validity

of a State statute in connection with the Consititution of the United States.

Although Horowitz asserts that he raised his due process claim both before the Board of Disciplinary Appeals and the Texas Supreme Court, neither the Board nor the Supreme Court addressed the issue in opinion or otherwise. Thus, the exact basis for the Supreme Court's decision is not known. Furthermore, their decision could have been reached without reaching any constitutional issues.

Therefore, this Court should deny Horowitz's petition for lack of jurisdiction.

ARGUMENT AND AUTHORITIES

COMPULSORY DISCIPLINE

Horowitz' petition essentially attacks the entire compulsory discipline procedure. Historically, in the area of discipline, lawyers who have been convicted of crimes have been viewed separately and apart from lawyers who have not been convicted of a crime but have nonetheless violated disciplinary rules of professional conduct. This is evident in light of the fact that since at least 1969, the Texas Supreme Court, in the exercise of its inherent power to regulate the practice of law, has seen fit to provide for a separate and expedited procedure for disciplining lawyers who have been convicted of criminal

acts. *See Part VIII, Texas Rules of Disciplinary Procedure (1992); Former Article X, §26, State Bar Rules (1984); Former Article 320a-1, §6, Vernon Tex. Civ. Stat. (Vernon 1969).*

As stated by the United States Supreme Court in *Ex Parte Wall, 107 U.S. 265, 274, 2 S.Ct. 569, 576, 27 L.Ed. 552 (1882)*:

> ". . . Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, . . . argues recreancy to his position and office, . . . It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. . ."

Other jurisidictions have implemented similar procedures in

addressing lawyer's who have been convicted of certain crimes. In this regard, all courts have a primary obligation to maintain the standards of the legal profession so that public confidence in the profession may continue. The goal is to protect the public, the courts, and the profession against unsuitable practitioners. There are certain qualities which are highly essential and desirable on the part of those who are to exercise the privileges and responsibilities of a member of the bar. They include honesty, integrity, fidelity to trusts, and good moral character. A lawyer's primary duty is to keep his own conduct above reproach because improper conduct by even a few

attorneys lowers the prestige of the profession and its effectiveness in performing its duties and responsibilities.

SEXUAL ASSAULT IS A CRIME INVOLVING MORAL TURPITUDE

The only genuine issue which was raised before the Board of Disciplinary Appeals was whether the crime of sexual assault is one involving moral turpitude. In Texas, the issue of whether a particular offense involves moral turpitude is strictly a question of law. *In the Matter of LLoyd Humphreys, 37 Tex.Sup.Ct. 620 (1994); State Bar of Texas v. Heard, 603 S.W.2d 829 (Tex. 1980).*

Consideration is also be given to the fact that the illegal act was committed by an attorney as opposed

to a layman. An attorney must be held to a more strict standard than the layman because of the position of public trust which he enjoys. *Muniz v. State, 575 S.W.2d 408 (Tex.Civ.App.--Corpus Christi 1978, writ ref'd n.r.e.)*

There is no question that the offense of sexual assault is per se a crime involving moral turpitude. One commentator had the following comments concerning the offense of sexual assault and its effect on the female victim:

> Rape profoundly alters women's sense of themselves and the world around them. For rape victims, relationships and places that once seemed non-threatening become potential sites of danger and vulnerability. In the aftermath of the assault, many rape victims experience symptoms such as anxiety,

fear, depression, and problems with social, professional and sexual adjustment. Some of these symptoms are not uncommon among victims of other crimes. But unlike victims of other crimes, women who have been raped cannot ever feel fully secure in their persons, because all of the precautions in the world cannot eradicate the single biggest risk factor for rape - their femaleness.

. . .

Rape not only harms the victim's bodily integrity, it assaults the body politic by diminishing the capacity of some of its members, on the basis of sex, from participating as autonomous equals in the public world.

. . .

Comparing rape to terrorism presents one route for re-understanding how rape functions like other violent social practices. Violent attacks against women are analogous to terrorism in that it is the "threat [that] does most of the work." . . . The acts of brutalization and mutilation that accompany sexual assaults carry a distinctive communicative impact, similar to the political

impact which terrorist acts have.

. . .

The majority of victims, in contrast, not only know their attackers, but in some cases know them intimately. This pre-existing relationship can make the experience of violence even more traumatic than an attack by a stranger, because the attacker is a person believed to be safe. Moreover, people can alter their lifestyle to reduce the risk of terrorism. But women in America are at the greatest risk of sexual assault in their own homes and on their streets. People can take measures to avoid terrorism, but women cannot take measures to avoid rape. It is not where a woman travels which puts her at risk, but rather the unalterable fact that she is a woman.

Brande Stellings, The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship, 28 Harvard Civil Rights: Civil Liberties Law Review, Winter '93.

Several jurisdictions, including Texas, have held that rape is an offense involving moral turpitude. The D.C. Court of Appeals in considering whether a lawyer who had been convicted of rape should be disbarred or allowed to resign voluntarily held that the offense of rape inherently involved moral turpitude. *In the Matter of Phillips, 452 A.2d 345, 346 (D.C. 1982)*. In the California case of *People v. Mazza, 221 Cal.Rptr. 640, 643 (1985)*, the court considered the issue of whether rape involved moral turpitude in the context of admissibility of prior convictions. The Court stated in pertinent part:

> "... Mazza contends, in apparent seriousness, that rape is not a crime involving moral turpitude...

While it may be suggested that the definition of moral turpitude may depend on the state of public morals, and that it may vary according to the community and the times [citation omitted], it never has been suggested that our public morality has sunk so low as to countenance the singularly depraved act of rape.

'Conviction of some crimes establishes moral turpitude on its face.' [citation omitted] Moral turpitude has been defined as a "'readiness to do evil'" [citation omitted] and as a "character trait which can reasonably be characterized as 'immoral' [citation omitted]. An act of moral turpitude is "'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man'."

Rape fits every suggested definition of moral turpitude. It is a reprehensible crime, offensive to every conception of morality. We

> hold that rape is a crime involving moral turpitude. [Emphasis Added]."

In Texas, the offense of rape has been held to be a crime involving moral turpitude for impeachment purposes. *Nutter v. Dearing, 400 S.W.2d 346, 353 (Tex.Civ.App.--Dallas 1966, writ ref'd n.r.e.).* See also *People v. Lewis, 237 Cal.Rptr. 64, 69 (1987)* [rape crime involving moral turpitude for impeachment purposes]; *State v. Lee, 237 S.E.2d 768, 771 (S.C. 1977)* [rape crime involving moral turpitude for impeachment purposes]; *Clark v. Alabama Bureau Mutual Casualty Insurance Company, 465 So.2d 1135, 1139 (Ala. 1984)* [rape crime involving moral turpitude for purposes of

application for insurance]; *Nu Sui Wing v. United States*, *46 F.2d 755, 756 (7th Cir. 1931)* [rape moral turpitude in context of deportation proceedings]; *People v. Paul*, *759 P.2d 740, 741 (Colo. 1988)* [sexual assault crime involving moral turpitude in context of deportation proceedings]

Relitigation of the criminal case is improper.

Although couched in terms of due process violations, what Horowitz actually seeks is a retrial of the criminal allegations in another forum. This is evident from the testimony offered in his bill of exceptions before the Board and in his statement in the petition that he believed he had the consent of the victim.

The defense that Horowitz believed he had the consent of his victim was offered at his criminal trial, included in the charge submitted to the jury, and rejected by the trier of fact. The charge of the court included Horowitz' defense as to his belief that Anissa Meinardus, the victim, had consented. It stated specifically:

> Therefore, if you find and believe from the evidence that the Defendant, JERRY HOROWITZ, on the occasion in question, through mistake, reasonably believed that Anissa Meinardus had consented to sexual contact or relations, and that, acting under such mistaken belief, he committed the act alleged, or if you have a reasonable doubt thereof, then you will find the Defendant "not guilty."

Thus, if the jury had believed this defense, Horowitz would not

have been found guilty of sexual assault. An inquiry into the facts is not appropriate for a determination of moral turpitude. It is the nature of the crime itself and how it bears upon an attorney's moral fitness to continue to practice law which governs the determination and not the facts and circumstances incident to the lawyer himself. *In the Matter of LLoyd Humphreys, 37 Tex.Sup.Ct.J. 340 (1994).*

If this Court is of the opinion that there are some crimes which require inquiry into the facts, unquestionably the offense of rape is not one of them. Every conviction for sexual assault should be held to be conduct involving

moral turpitude, and the courts have universally held that the offense is one involving moral turpitude. If this Court is of the opinion that the felony offense of sexual assault requires inquiry into the facts, then it should look only to the indictment and charge of the court utilized in the criminal proceeding. **Horowitz was not denied due process.**

Horowitz was given both notice and an opportunity to be heard with respect to the compulsory discipline action. A hearing was held at which he was competently represented by counsel. In compulsory discipline proceedings, it is the judgment of conviction itself that forms the basis of the lawsuit. Furthermore, the record of the conviction is

conclusive evidence of the attorney's guilt. *Tex.R.Disc.P. 8.01 & 8.02.* (See Appendix to Horowitz Petition Pp. 9a-13a [Part VIII of the Texas Rules of Disciplinary Procedure reprinted]). The compulsory discipline scheme requires confidence and trust in the criminal justice system where a higher burden of proof is required for a conviction and stronger constitutional protections are afforded the defendant.

In order for the Court to declare a due process violation, it would have to find the entire compulsory discipline scheme for Texas and every other jurisidiction unconstitutional.

In conclusion, the offense of sexual assault is a crime involving moral turpitude and Horowitz'z petition should be denied.

SUMMARY AND CONCLUSION

Horowitz has failed to properly invoke jurisdiction of this Honorable Court as no federal question was decided by a state court of last resort. His Petition amounts to nothing more than an attempt to retry the criminal case which formed the basis of the disciplinary lawsuit.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and

further relief as this Court may deem proper.

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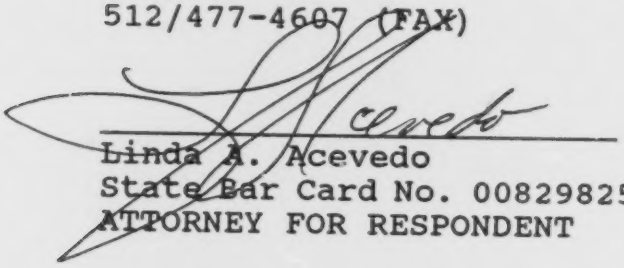

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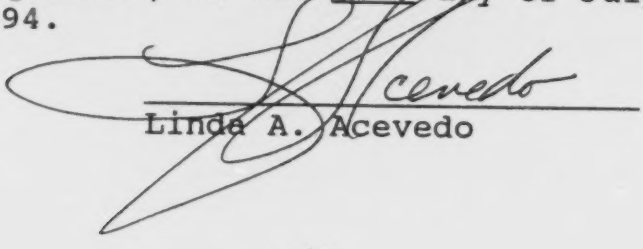
CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Kurt M. Sauer, 100 Congress Avenue, Suite 1700, Austin, Texas 78701, attorney for Petitioner, by delivery of true and correct copies to him by certified mail, return receipt requested, on the 5th day of July, 1994.



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